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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MICHAEL HELLYAR, Plaintiff and Respondent, v. MBE DIGITAL, INC., Defendant and Appellant, ADESORN HEMARATANATORN, Defendant, Cross-Complainant and Respondent; DAVID PASTERNAK, Real Party in Interest and Respondent.	B231107 (Los Angeles County Super. Ct. No. VC056465)

APPEAL from an order of the Superior Court of Los Angeles County. Thomas I. McKnew, Jr., Judge. Affirmed.

Law Offices of JD Sanchez, and JD Sanchez for Defendant and Appellant MBE Digital, Inc.

Michael J. Allison for Plaintiff and Respondent Michael Hellyar.

The Jamison Law Firm, and Guy E. Jamison for Defendant, Cross-Complainant and Respondent Adesorn Hemaratanatorn.

Pasternak, Pasternak & Patton, and John W. Patton, Jr. for Real Party in Interest and Respondent.

We affirm the order appointing a receiver.

FACTS

Michael and Annette Hellyar married in November 2005. In July 2009, Annette filed a petition for dissolution of the marriage.[1] (*In re Marriage of Hellyar* (Super. Ct. L.A. County, 2010, No. KD076342).) An issue of contention in the dissolution action is Michael's claim that he owns a business, MBE Digital, Inc. (MBE), as his separate property pursuant to a written agreement with Annette, and Annette's claim that she owns part of MBE's total number of shares as her separate property.

In March 2010, Michael filed a civil action for declaratory relief, imposition of a constructive trust, or imposition of a resulting trust. (*Hellyar v. Hellyar et al.* (Super Ct. L.A. County, 2010, No. VC056465).) The current appeal arises from Michael's civil action. The named defendants in the civil action are MBE, and several individuals claiming an interest in MBE, including Annette, Cindy Lou Lujan, Brian Rayner and Adesorn Hemarantanatorn.[2] Michael's complaint prays for an order declaring that stock issued to Annette in her name actually belonged to Michael, and directing Annette to transfer the stock to Michael. The complaint further seeks a judgment declaring the respective rights of all of the parties claiming an interest in MBE. Hemarantanatorn filed a cross-complaint against all of the other parties.[3]

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[1] We use first names in this opinion for sake of clarity.

[2] Hemarantanatorn allegedly loaned money to Michael, secured by an interest in MBE.

[3] We presume that Hemarantanatorn's cross-complaint has something to do with the loan he made to Michael, and involves a claim for relief concerning his rights to enforce repayment of the loan, vis-à-vis MBE. The record before us on the current appeal does not include a copy of the cross-complaint.

On June 15, 2010, Michael and Hemarantanatorn filed a joint ex-parte application for the appointment of a receiver for MBE. The application for a receiver was based on a showing that Annette (and other parties) were harming MBE's business to the detriment of Michael, MBE's rightful owner, as well as to Hemarantanatorn, whose loan is secured by an interest in MBE. On June 15, 2010, Annette, Rayner and Lujan all filed papers in opposition to the appointment of a receiver. The record designated by MBE on appeal does not include a copy of the trial court's minute order from June 15, 2010, but we have a copy of the order courtesy of the receiver's motion to augment the record on appeal. The court's minute order shows that the court did not rule on the application at the time of the ex parte hearing on June 15, 2010; the court and counsel conferred, and the court set a hearing on the matter for July 1, 2010.

On June 29, 2010, Annette and others filed more papers voicing their opposition to the application for the appointment of a receiver.

At the hearing on July 1, 2010, the trial court heard arguments on the appointment of a receiver. The court's minute order of that date, which, again, we have before us only because the receiver filed a motion to augment the record on appeal, shows that the court took the matter under submission.

On July 23, 2010, the trial court issued a minute order indicating that it was "considering" the appointment of a receiver. The record designated by MBE on appeal does not include a copy of the trial court's minute order of July 23, 2010, but we have a copy of the order courtesy of the receiver's motion to augment the record on appeal. On August 24, 2010, the trial court signed and entered a formal written order appointing David J. Pasternak, a member of the State Bar, as receiver for MBE. The court's five-page order set forth the receiver's compensation, and his powers and duties as receiver, specifically, to examine MBE's books and conduct an investigation of MBE's financial affairs, and file a written report of findings. The order appointing the receiver expressly provides: "Before performing his duties, the Receiver shall execute a Receiver's oath, and file an undertaking in Department H of this Court from an admitted surety insurer in the sum of $5,000, conditioned upon the faithful performance of the Receiver's duties."

On September 28, 2010, the receiver filed the required undertaking in the amount of $5,000 in the trial court. The record designated by MBE on appeal omits any material concerning the $5,000 undertaking; we have a copy of the undertaking by way of the receiver's motion to augment the record on appeal.

On December 17, 2010, party Adesorn Hemaratanatorn (the loan creditor, *post*) filed an ex parte application for order granting the receiver full powers over MBE. The application alleged that Annette and others were "pillaging" MBE. The ex parte application was supported by declarations from Michael, and his counsel, and from a former employee. The evidence showed that contracts were being issued in the name of a new company, that expense reports were being inflated, that petty cash reimbursements were paid for personal expenses, and that MBE was not cooperating with the receiver by withholding company documents regarding such matters as leases. On appeal, MBE does not challenge this evidentiary showing.

On December 21, 2010, the trial court signed and entered a "Supplemental Order Appointing Receiver." The court's ten-page supplemental order grants the receiver "full and exclusive power, duty, and authority to administer and manage all of MBE's business affairs . . . [,]" up to and including the "authority to file any voluntary bankruptcy petition on behalf of MBE." The order expressly provides: "Before performing his duties, the Receiver shall increase his posted undertaking in Department H of this Court from an admitted surety insurer to $20,000.00, conditioned upon the faithful performance of the Receiver's duties."

On December 27, 2010, the receiver filed the required undertaking in the amount of $20,000 in the trial court. The record designated by MBE on appeal omits any material concerning the $20,000 undertaking. Again, we have a copy of the undertaking only because of the receiver's motion to augment the record on appeal.

On February 16, 2011, MBE filed a notice of appeal from the trial court's Supplemental Order dated December 21, 2010.

DISCUSSION

I. The Orders Appointing a Receiver

MBE contends the orders appointing the receiver must be reversed because "neither ex parte application for appointment of receiver was supported by any bond or undertaking, nor was a bond ever ordered to be filed." He tells us: "There is no doubt that a receivership, imposed upon ex parte application without the undertaking mandated by Code of Civil Procedure [section] 566(b), *is beyond the court's jurisdiction and void*."[4] We find no error in the trial court's orders.

Section 566(b) provides: "If a receiver is appointed upon an ex parte application, the court, before making the order, must require from the applicant an undertaking in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages the defendant may sustain by reason of the appointment of the receiver and the entry by the receiver upon the duties, in case the applicant shall have procured the appointment wrongfully, maliciously, or without sufficient cause."

MBE is wrong that a violation of section 566(b) occurred in this case. First, the receiver was not appointed upon an ex parte application. On June 15, 2010, the date that Michael and Hemaratanatorn submitted their initial joint ex parte application for the appointment of a receiver, the trial court declined to grant ex parte relief. Instead, the trial court set the matter of the appointment of a receiver on calendar for a noticed hearing. The court afforded MBE and the other opponents of a receiver an opportunity to fully brief the issue, and then heard arguments on the issue. We are not impressed that MBE designated a record on appeal which shows nothing more than the ex parte application filed in June 15, 2010, and the court's order dated August 24, 2010, appointing the receiver. The full record, before us only because the receiver augmented the record on appeal, and giving a true picture of the events between June 15, 2010 and August 24, 2010, demonstrates that the appointment of a receiver was not by an ex parte order. The fact that a particular document which put an issue before the trial court was

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[4] All further section references are to the Code of Civil Procedure. Section 556, subdivision (b), is hereafter section 556(b).

labeled ex parte does not, as MBE seems to believe, mean that the trial court thereafter necessarily issued an ex parte order. Where, as here, a noticed hearing is set, and a full opportunity for briefing is allowed, there is nothing ex parte about the proceeding. There are no authorities cited in MBE's opening brief on appeal teaching otherwise. The trial court's first order, issued on August 24, 2010, was not issued ex parte. Section 566(b) was not implicated.

The trial court's second order, issued on December 21, 2010, expanding the receiver's powers and duties, was issued upon an ex parte application. However, section 566(b) is not implicated by its plain language. Section 566(b) only applies upon the initial appointment of a receiver. Generally speaking, the purpose of section 566(b) in requiring an applicant's bond is to provide protection covering harm caused by an error of the applicant in obtaining the appointment of the receiver ex parte, i.e., on an emergency basis; liability on the applicant's bond is enforced upon proof the applicant committed error in obtaining the receiver's appointment ex parte, an initial opportunity to prove error having been unavailable in the initial ex parte context. (See, e.g., *Smith v. Hill* (1965) 237 Cal.App.2d 374, 385-386.) An ex parte appointment of a receiver without the required applicant's bond is void. (*Sweins v. Superior Court* (1936) 16 Cal.App.2d 336.) When a receiver has been appointed, protection covering harm caused by the receiver's failure to discharge faithfully his or her duties is afforded by the receiver's bond. (Code Civ. Proc., § 567, subd. (b).) And, when a trial court *expands* an existing receiver's powers and duties upon an ex parte application, protection against harm continues to be afforded by way of the receiver's bond. The record, as augmented by the receiver, shows that the trial court ordered the receiver to file an increased undertaking in the amount of $20,000 before performing his expanded duties, and shows that the receiver filed the required undertaking before performing his duties.

II. Sanctions

After reviewing MBE's opening brief on appeal, the receiver's brief in response, the record that MBE designated on appeal, and the augmented record submitted by the receiver, we served MBE with an order to show cause (OSC) advising that we were

considering, on our motion, whether the imposition of sanctions was justified for a frivolous appeal. (See Cal. Rules of Court, rule 8.276(c).) Although we find MBE's failure to give us a true picture of the events in the trial court troubling, we decline to impose sanctions. The trial court's order dated December 21, 2010 was issued ex parte, and MBE presented an arguable position that section 556(b), was implicated.

DISPOSITION

The trial court's order of December 21, 2010, is affirmed. The OSC is discharged. Respondents shall recover their costs on appeal.

BIGELOW, P. J.

We concur:

RUBIN, J.

GRIMES, J.